Supreme Court, U.S.
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No. 87-

In the Supreme Court of the United States

OCTOBER TERM, 1987

KALIMA JENKINS, *et al.*,
Petitioners,

-v-

THE STATE OF MISSOURI, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Whether the courts below erred in denying petitioners a contingency enhancement despite finding "that the Kansas City market generally compensates for assuming the risk of contingency cases" and uncontroverted proof that in major school desegregation cases plaintiffs encounter great difficulty obtaining counsel on a contingent fee basis even with the prospect of a court-awarded contingency enhancement.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Appellees/cross-appellants (now petitioners):

Kalima Jenkins, by her next friend, Kamau Agyei

Carolyn Dawson, by her next friend, Richard Dawson

Tufanza A. Byrd, by her next friend, Teresa Byrd

Derek A. Dydell, by his next friend, Maurice Dydell

Terrance Cason, by his next friend, Antoria Cason

Jonathan Wiggins, by his next friend, Rosemary Jacobs Love

Kirk Allan Ward, by his next friend, Mary Ward

Robert M. Hall, by his next friend, Denise Hall

Dwayne A. Turrentine, by his next friend, Sheila Turrentine

Gregory A. Pugh, by his next friend, Barbara Pugh

Cynthia Waters, by her next friend, David Winters, on behalf of themselves and the class of black and

white present and future students in the Kansas City, Missouri School District.

Appellant/cross-appellees (now respondents) the Kansas City, Missouri School District and Dr. George Garcia, Superintendent.

Appellants/cross-appellees (now respondents):

The State of Missouri

Honorable John Ashcroft, Governor of the State of Missouri

Robert Bartman, Commissioner of Education of the State of Missouri

Wendell Bailey, Treasurer of the State of Missouri

The Missouri State Board of Education:

Roseann Bentley, President
Dan Blackwell
Terry A. Bond
Roger L. Tolliver
Raymond McCallister, Jr.
Susan D. Finke
Thomas R. Davis
Cynthia B. Thompson

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

KALIMA JENKINS, et al.,

Petitioners,

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THE STATE OF MISSOURI, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, KALIMA JENKINS, the named representative of a certified class, et al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit affirming the denial of a contingency enhancement of the attorney's

fees awarded petitioners for the work of their lead counsel, Arthur Benson.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 838 F.2d 260, is set out in the Appendix, 2a. The unpublished May 11, 1987 order of the United States District Court for the Western District of Missouri is at 43a. The unpublished July 14, 1987 order of the District Court amending its May 11, 1987 order is at 91a.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals entered judgment on January 29, 1988, and denied the State of

Missouri respondents' request for rehearing on April 13, 1988.

STATUTORY PROVISIONS INVOLVED

This case involves The Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), which provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

I. Preliminary Statement

This petition arises from the attorneys' fees phase of the Kansas City, Missouri school desegregation case. The action arose under the Constitution and

laws of the United States and 28 U.S.C. § 1343 and jurisdiction of the United States District Court was based on 28 U.S.C. § 1331. The school children petitioners, as prevailing parties in the school desegregation case concluded against the State of Missouri and the School District of Kansas City, Missouri (KCMSD), sought a reasonable attorney's fee for their counsel's work in vindicating their constitutional rights, principally pursuant to 42 U.S.C. § 1988.

A. The "Merits" Litigation

Following extensive discovery that involved over 180 depositions and a trial that required 93 days, petitioners obtained a judgment against the State of Missouri and the KCMSD imposing joint liability for the segregated schools of

Kansas City on September 17, 1984. Jenkins v. State of Missouri, 593 F.Supp. 1485 (W.D.Mo. 1984). After two more weeks of trial, petitioners obtained an order against the State and the KCMSD on June 14, 1985, requiring $37 million in capital improvements and $50.7 million in new operating programs to remedy the constitutional violations found by the district court. Jenkins v. State of Missouri, 639 F. Supp. 19 (W.D. Mo. 1985).

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's dismissal of the suburban school districts and certain federal defendants and affirmed the Milliken II (Milliken v. Bradley, 433 U.S. 267 (1977)) remedies imposed on the State and the KCMSD (with some modifications). Jenkins v. State of

Missouri, 807 F.2d 657 (8th Cir. 1986)(en banc), cert. denied, ____ U.S. ____, 108 S.Ct. 70, 98 L.Ed.2d 34 (1987).

B. The "Fees" Litigation

Arthur Benson, petitioners' lead counsel, commenced his representation of petitioners in February 1979. During the course of the litigation Benson's representation encompassed not only his personal efforts, but also those of two associates, seven paralegals, and his secretarial and clerical staff. Because the resources of his law office were limited to those just described, Benson eventually obtained the assistance of the NAACP Legal Defense and Education Fund, Inc. (LDF). Several LDF attorneys assisted Benson on the litigation and the LDF shared the burden of the litigation

expenses. (Since this Petition for Writ of Certiorari is limited to the denial of a contingency enhancement on petitioners' claim for Benson's services, the factual discussion will be limited to the legal services Benson provided petitioners.)

Petitioners' attorney's fees request covered seven years' work through June 30, 1986, and included work on the liability and the initial remedy stages of the case and first year monitoring. In recognition that petitioners were unsuccessful in certain claims against the suburban districts and the federal defendants, and that Hensley v. Eckerhart, 461 U.S.424 (1983), would require some reduction in fees, petitioners volunteered a reduction of 4,490 of Benson's hours. 96a - 97a. (This voluntary reduction, based on the hourly rates actually awarded by the

district court, was $318,761, approximately 21% of the lodestar petitioners requested for Benson.) The requested lodestar, after the Hensley reductions, was based on 9677 attorney hours and 5586 paralegal hours.

Petitioners sought a risk or contingency enhancement on behalf of Benson, requesting an enhanced hourly rate of $375 for Benson for work done through September 17, 1984, the date of the district court's ruling on liability (and a $240 hourly rate for his associates' work). The requested enhancement was reduced to $250 per hour for Benson (and $160 per hour for his associates) for the remedy work done through June 30, 1985, the date of the principal decision on remedies. See generally, "Suggested Approach to Awarding Fees," filed Jan. 16, 1987, Tab XII, at

pages 4-5. No risk enhancement was sought for monitoring or for the fees litigation.

The district court held a one-day evidentiary hearing on February 27, 1987.

1. Extraordinary Preclusion and Delay in Payment Problems Were Presented by the Case.

Benson's contract with the petitioners provided for payment only through court-awarded attorney's fees should the litigation prove successful. Benson Aff., Feb. 5, 1986, Tab D at 2. Neither petitioners nor the LDF paid Benson any fees for his work on this case. The district court made the following findings in its May 11, 1987 Order (51a - 52a):

> [F]rom early 1983 until the end of 1985 Benson devoted nearly all of his professional time to this case and was thereby precluded from accepting other employment. Similarly, Benson's staff was also precluded from other employment for a period of at least one year while working full time on this litigation.

From 1983 through 1986 Benson borrowed in excess of $633,000 in order to maintain his law firm as a viable organization through the course of the litigation. Benson Aff., Jan. 16, 1987, Tab III; T. at 131-132; see also June 30, 1987 D.Ct. Order, at page 1. This debt was incurred by Benson to obtain the funds necessary pay his own and staff salaries, his office overhead, and $73,000 in direct litigation expenses. Through December 31, 1986, Benson had paid $113,706 in interest on this indebtedness, and he continued to pay approximately $5000 per month in interest. Benson Aff., Jan.16,1987, Tab III. In addition to the $633,000 owed financial institutions, Benson owed his associates and staff some $97,000 in deferred compensation for overtime worked on the case. T. at 125, 131.

The economic loss due to delay in payment was quantified by the uncontroverted testimony of Robert Weil, a prominent expert on law office economics, and John Ward, a University of Missouri professor of economics. Both testified that payment at current hourly rates would not adequately compensate for the delay in payment, with Weil explaining that "hourly rates have not gone nearly as high as the compounding effect of use on interest rates." T. at 116. Weil explained that, even assuming Benson's hourly rate was only the midwest average of $72.50 in 1979, Benson would have to be paid $203 per hour in 1987 (based on the prime rate plus 1%) to be fully compensated for the delay in payment for work done in 1979. T. at 113-114; P.Ex. 5 at p.10.

2. Desegregation Plaintiffs Experience Great Difficulty Obtaining Counsel Without The Prospect of Risk Enhancement.

Max Foust, one of Kansas City's most experienced and respected trial attorneys, Gordon Gee, a Kansas City attorney experienced in complex federal litigation, and Mark Bennett, the leading civil rights private practitioner in Iowa, testified as to the enormous investment required of Benson to litigate this case and the extraordinary and complete preclusion of Benson's law practice for nearly three years. T. at 80-87; Attachments V (Bennett at 3-5) and VII (Gee at 6-7) to Plaintiffs' Brief, filed Jan. 16, 1987. Foust and Gee testified that their law firms would not have undertaken this case due to the economic devastation such preclusion would have had on their firm's overall practice.[1] T. at 87; Attachment VII, supra at 6-7. Bennett testified that

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[1]Foust testified (T. at 88): "[I]t would have presented a matter of such magnitude that it would have destroyed my

his firm, which specializes in civil rights litigation, would not have represented "the plaintiffs without remuneration of a substantial retainer and ongoing payment of my hourly rate of $125.00 per hour." Attachment V, supra at 5-6.[2]

Julius Chambers, Executive Director for the NAACP Legal Defense and Education Fund, testified that this case proved to be the largest and most expensive ever litigated by the LDF. T. at 48. Chambers testified that the LDF's litigation efforts rely heavily on the labors of attorneys in the community in which the litigation occurs. These private

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office and what I do. I mean, I wouldn't have had the personnel, and I have got seven lawyers. I wouldn't even have considered it, as I understand what all went on."

[2]Bennett testified: "In my opinion, this case presented, at the outset, a very substantial degree of risk due to the sheer magnitude and complexity of litigation that is not present in most civil

attorneys, called "cooperating" attorneys, are paid no fees by the LDF. T. at 50. Chambers testified (T. at 51-52):

> We have encountered in recent years some real difficulty in getting cooperating attorneys to become involved with us in cases. * * * In school cases, because school cases take so long and the recoveries are so limited in terms of attorney fees, generally that, we have difficulty in getting cooperating attorneys to become involved in these cases.

3. The Kansas City Market Compensates for Risk in Successful Contingent Fee Cases.

Foust also testified his firm regularly reviews its yield on each case and has made it a practice to maintain

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rights cases. Indeed, the magnitude of this litigation presents such formidable, if not insurmountable, hurdles, I know of no small or mid-size firm, let alone a firm that specializes in civil rights, which would have been in a position to undertake this litigation." Attachment V, supra at 6.

"meticulous [time] records on contingent fees for probably 15 years." T. at 77. Those records showed that the attorneys in Faust's firm have earned fees in successful cases litigated on a contingency fee basis which average $400 to $500 per hour, T. at 78-79, or roughly three to four times what an attorney's hourly billing rate would be in noncontingent cases. T. at 87; see also affidavits of Kansas City attorneys Michael Waldeck (contingency fee compensation is "often three to four times and can be as much as ten times greater than the fee which would be received if the case were billed on an hourly basis") and Ilus Davis, Plaintiffs' Motion for Partial Award of Attorneys' Fees and Expenses, Tab E, filed February, 1986. Faust testified his firm's experience was representative of contingent fee compen-

sation in the Kansas City area. T. at 78-79. Law office economics expert Robert Weil confirmed that the $400 to $500 hourly return from successful contingent fee litigation accurately represented the national experience as well. T. at 117.

C. The District Court Decision

On May 11, 1987, the district court awarded petitioners fees and expenses of $1,614,437 for the work of Benson and his staff on the merits and $72,702 for their work on the fees litigation. 85a. The district court amended its judgment on July 14, 1987 and awarded an additional $42,090 for Year I monitoring fees and expenses. 95a. The total amended fees judgment for Benson's work is $1,729,230.37.[3]

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[3]This judgment includes nearly $55,000 which Benson owes to counsel who assisted

The district court based its fees calculation on hourly rates of $80 for Benson's associates, $40 for Benson's paralegals, and $200 for Benson's personal time (87a - 88a); it awarded the hours requested in their entirety (which reflected the 21% Hensley reduction). The district court stated that the hourly rates awarded Benson included an enhancement to compensate him for the substantial delay in payment, preclusion of other work, and the loss of work due to the undesirability of the case. 51a - 53a. The precise amount of the enhancement was not stated; but the apparent result was a $25-40 per hour increase of Benson's per-

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him on the fees litigation or on part of the merits litigation. 87a - 88a. It also includes nearly $80,500 in reimbursement for direct litigation expenses. 88a - 89a.

sonal hourly rate (and a total enhancement in the range of $125,520 to $200,832). The district court, however, declined to award any contingency enhancement to petitioners for Benson's work on the ground that "plaintiffs' likelihood of success in their claim against the State of Missouri defendants was very high, and thus Benson's risk of nonpayment was very slight". 56a.

D. The Court of Appeals Decision

The court of appeals affirmed the judgment of the district court in all respects. Jenkins by Agyei v. State of Missouri, 838 F.2d 260 (8th Cir. 1988).

The court acknowledged that the "district court's order was entered before the Supreme Court handed down its decision in Pennsylvania v. Delaware Valley

Citizens' Council for Clean Air, __ U.S. __, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987)(Delaware Valley II)", 38a. The court found that Justice O'Connor's opinion was the touchstone by which to judge contingency enhancement requests. It concluded plaintiffs must prove (1) "that the relevant market compensates for contingency cases as a class, rather than on proof of any particular risks peculiar to the case in question", 39a, and (2) "that 'without an adjustment for risk the prevailing party "would have faced substantial difficulties in finding counsel in the local or other relevant market."'" Id. (quoting J. O'Connor Op. which quoted J. White Plurality Op.).

Although the court recognized Delaware Valley II represented an intervening decision and that the district

court did not apply the correct standard to petitioners' contingency enhancement request, the court declined to reverse or remand:

> [P]laintiffs would have fared no better under Justice O'Connor's analysis, since they failed to adduce proof that they would have faced substantial difficulties finding representation without an adjustment for contingency. While plaintiffs presented evidence that the Kansas City market generally compensates successful attorneys for assuming the risk of contingency cases, they did not introduce any evidence about availability of counsel to plaintiffs in the absence of contingency adjustments. Several attorneys testified that they would not have taken the case at all, and one civil rights litigator testified he would not have taken the case without regular payments. Testimony of these individuals comes short of proof that adjustment for contingency was a crucial factor in plaintiffs' ability to obtain counsel. See generally Blum v. Witco Chemical Corp., 829 F.2d 367, 380-81 (3d Cir. 1987). On the record, we do not discover the proof required by Justice O'Connor as prerequisite for award of a contingency enhancement. See Catlett [v. Missouri

Highway and Transportation Commission, 828 F.2d 1260 (8th Cir. 1987)] at 1271.

40a - 41a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE CONTINGENCY ENHANCEMENT EVIDENTIARY STANDARD APPLIED BY THE COURT OF APPEALS EITHER CONFLICTS WITH THIS COURT'S DECISION IN DELAWARE VALLEY II, OR, REFLECTING THE EXISTING CONFUSION IN THE LOWER COURTS, REPRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. Introduction

1. Delaware Valley II

In Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, ____ U.S. ___, 107 S.Ct. 3078 (1987)(Delaware Valley II), this Court, on a 4-1-4 vote, reversed a contingency enhancement awarded by the district court for work done in various stages of consent decree enforcement due to the lack of evidentiary justification.[4] Id. at 3091. Although

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[4]A plurality of four justices, in an

joining the plurality in voting to reverse the particular risk enhancement in question, Justice O'Connor voted with the four dissenting justices to create a majority holding that federal fees-shift statutes, such as 42 U.S.C. § 1988, do authorize the "consideration of contingency in setting a reasonable fee" with compensation for contingency to "be based on the differences in market treat-

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opinion by Justice White, rejected the enhancement on three grounds: first, they questioned whether an enhancement for risk was ever appropriate for post-judgment work; second, they concluded that even if a risk enhancement were appropriate, doubling the lodestar was excessive; and third, they found no evidence that without a risk enhancement the plaintiffs would have faced substantial difficulties in finding counsel in the local market. Id. at 3088-89.

Justice O'Connor concurred in the judgment, emphasizing there was no evidence as to whether contingency was enhanced in the local market nor as to whether the large enhancement awarded was necessary to attract competent counsel.

ment of contingent fee cases as a class, rather than on an assessment of the 'riskiness' of any particular case." Id. at 3089 (emphasis in original).

Justice Blackmun, the author of the dissenting opinion, wrote that the district court, in determining whether plaintiffs are entitled to a basic contingency enhancement, must determine "whether a case was taken on a contingent basis, whether the attorney was able to mitigate the risk of nonpayment in any way, and whether other economic risks were aggravated by the contingency of payment." Id. at 3098. Justice O'Connor indicated that she may require a slightly higher threshold showing: "I agree with the plurality that no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for

risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" Id. at 3091.

It can come as no surprise that this Court's splintered, 4-1-4 decision in Delaware Valley II has left considerable uncertainty and confusion. This Court should revisit this unresolved and extremely important area of attorney's fees law. Certiorari is appropriate "[w]hen . . . a federal court of appeals . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." S.Ct.R. 17.1(c). This is such a case.

2. The "Two Court" Rule Does Not Apply

The instant case involved de novo appellate factual review of petitioners' contingency enhancement request by the Eighth Circuit. The requested enhancement had been denied by the district court in a decision rendered prior to Delaware Valley II, a decision based on criteria the Eighth Circuit acknowledged were inconsistent with Delaware Valley II. 39a - 40a. It is important to note that the Eighth Circuit did not concur in the findings of fact of the district court; rather it made its own findings. 40a - 41a. As a result the "two court" rule that is frequently invoked to deny review of cases that turn on fact finding is not here applicable. See Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949).

B. The Court Should Grant Certiorari Because The Court Of Appeals' Decision Denying Plaintiffs A

Contingency Enhancement Squarely Conflicts with Delaware Valley II.

The Eighth Circuit concluded that petitioners satisfied the first prong of Justice O'Connor's standard, finding "that the Kansas City market generally compensates successful attorneys for assuming the risk of contingency cases". 40a. The court, however, concluded petitioners failed to prove "that adjustment for contingency was a crucial factor in plaintiffs' ability to obtain counsel." 41a. It appears decisive to the Eighth Circuit that petitioners "did not introduce any evidence about availability of counsel to plaintiffs in the absence of contingency adjustments." 40a.

The court of appeals' focus, as recognized by at least two courts, runs counter to the fundamental premise of Delaware Valley II. As Judge Parker

instructed in McKenzie v. Kennickell, D.D.C. No. 73-0974 (4-18-88) at page 14:

> It is impossible to demonstrate that plaintiffs actually had difficulty finding counsel without embroiling the courts in an analysis of the riskiness of the particular case. Yet Delaware Valley II resoundingly rejected such an inquiry.

See also Palmer v. Shultz, 679 F.Supp. 68, 75 (D.D.C. 1988), which, on identical reasoning, rejects the defendants' arguments that plaintiffs had failed to make the requisite showing under Delaware Valley II because "none of the affidavits contain any facts indicating that attorneys in the Washington, D.C. community will not take a Title VII case on a straight contingency basis."

Review of the evidence expressly credited by the Eighth Circuit, particularly when considered with the uncontroverted testimony of LDF Executive

Director Julius Chambers as to the difficulties plaintiffs encounter in obtaining counsel in school desegregation cases, confirms petitioners satisfied their evidentiary burden. Although the court credited the testimony of "[s]everal attorneys" that "they would not have taken the case at all", 40a, it declined to state that each testified that taking on such an all-encompassing, mammoth case on a contingent fee basis would break down their small firm practices due to its preclusion of all other work. The court did note that "one civil rights litigator" testified that "he would not have taken the case without regular payments", 40a - 41a, but it failed to appreciate the significance of that testimony. Furthermore, the court failed to acknowledge the testimony of Julius Chambers, the

respected Executive Director of the LDF, that it has become very difficult for the LDF to secure private practitioners as cooperating counsel in school desegregation cases because of the uncertainty of recovering a fully compensatory fee even when one prevails. "Statement of the Case," supra at 13 - 14.

In sum, the Court of Appeals failed to draw the obvious and compelling factual conclusion: there have been and continue to be very few private practitioners anywhere who will provide plaintiffs with representation in a school desegregation case; there are even fewer who will do so on a contingent fee basis; and, of those few who would provide representation on a contingent fee basis, they rightfully expect to receive a very substantial enhancement of their normal hourly rate

should plaintiffs prevail after years of bitterly contested litigation. There is no scope of review standard which requires the Supreme Court to be blind to that which all the world knows.

This was an extraordinary case by any measure. It required extraordinary lawyering and leadership. It required an extraordinary commitment of resources. It achieved exceptional results -- far-reaching relief that promises equal educational opportunity for the black children of Kansas City and significant reduction of their racial isolation. The leader of this entire effort was Kansas City practitioner Arthur Benson, who made a financial and personal commitment to this litigation unprecedented in the reported fees decisions. The uncontroverted facts are that in addition to a

total personal and professional commitment to this case for three consecutive years of full-time work, Benson worked substantial portions of five additional years and went over $730,000 in debt in order to litigate this case successfully.

Although petitioners did not have the benefit of Delaware Valley II when they made their evidentiary presentation, their case for a risk enhancement is compelling. Although, as petitioners demonstrate in the subsequent section, Delaware Valley II did not limit contingency enhancements to the exceptional or rare case, petitioners submit their evidentiary showing satisfies the most stringent of standards.

Finally, petitioners would note that the record in the instant case would permit the Court not only to resolve the standard which must be met to establish

entitlement to a risk enhancement, but also to instruct as to the calculation of such enhancements when entitlement has been established. Petitioners presented extensive market-based evidence on this latter question, which was summarized in the "Statement of the Case," supra at 14-16. In sum, that uncontroverted Kansas City market evidence showed the average hourly return on successful contingent fee cases is $400-500, an amount which Robert Weil confirmed was consistent with the national market. Petitioners' enhancement request for Benson's work was at the bottom end or below the Kansas City market range.

C. The Court Should Grant Certiorari Because The Evidentiary Standard To Establish Entitlement To A Contingency Enhancement, As Fashioned By The Court Of Appeals, Permits Enhancement Only In The Rare Or Exceptional Case, A Standard Far More Stringent Than

And In Conflict With This Court's Decision In Delaware Valley II.

The courts of appeals which have had occasion to apply Delaware Valley II agree that it authorizes a contingency enhancement in appropriate cases. However, there the consensus stops.

The Third, Fourth, Fifth, Eighth, District of Columbia and Federal Circuits have concluded that Justice O'Connor's opinion effectively establishes the standard for the Court. Blum v. Witco Chemical Corp., 829 F.2d 367, 379-382 (3d Cir. 1987); Spell v. McDaniel, 824 F.2d 1380, 1404 n.23 (4th Cir. 1987); Leroy v. City of Houston, 831 F.2d 576, 583-84 (5th Cir. 1987); Jenkins v. State of Missouri, supra; Thompson v. Kennickell, 836 F.2d 616,621 (D.C.Cir. 1988); Crumbaker v. Merit Systems Protection Board, 827 F.2d 761 (Fed.Cir. 1987). These courts read

Justice O'Connor's opinion to require the plaintiffs to prove (1) that the relevant legal market compensates contingency cases differently from non-contingency cases, and (2) that absent the prospect for an enhancement, the plaintiffs would have faced substantial difficulty in securing counsel.

While the Third Circuit in Blum, supra, frankly acknowledges the confusion left by Delaware Valley II as to the required evidentiary showing for a contingency enhancement, see Section I(E) infra, it and the five other courts adopting Justice O'Connor's standard appear uniform in their belief that it permits risk enhancements only in the "exceptional" or "rare" case. Such is the express holding of the Third, Fifth and District of Columbia Circuits. Blum,

supra at 380 n.13; Student Public Interest Research Group of New Jersey, Inc. et al. v. AT&T Bell Laboratories, 842 F.2d 1436, 1452 (3d Cir. 1988); Coup v. Heckler, 834 F.2d 313,324 (3d Cir. 1987); Leroy, supra at 583-84 (contingency award "reserved for 'exceptional cases'"); Thompson v. Kennickell, supra at 621. See also Norman v. Housing Authority of City of Montgomery, 836 F.2d 1291, 1302 (11th Cir. 1988)("the rare case"). Although the Eighth Circuit did not choose to characterize the burden of proof imposed by Justice O'Connor's standard, its grudging rejection of plaintiffs' factual showing in the instant case confirms its accord.

Petitioners submit that had Justice O'Connor intended that contingency enhancement only be available in the rare

or exceptional case, she would have clearly so stated. Her decision not to use such restrictive language takes on particular significance when it is recalled that in Pennsylvania v. Delaware Valley Citizens Council for Clear Air, __ U.S.__, 106 S.Ct. 3088 (1986)(Delaware Valley I), this Court expressly reaffirmed its position that upward adjustments of the lodestar based on the quality of the legal services provided "are proper only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." Id. at 3098; see also Blum v. Stenson, 465 U.S. 886, 899 (1984). The Delaware Valley II standard for contingency enhancement is clearly not as restrictive as the Delaware Valley I standard for quality enhancement.

Petitioners contend that the Eighth Circuit committed plain error in its evaluation of petitioners' evidentiary showing under Justice O'Connor's 2-prong standard, an error influenced by its mistaken view that Delaware Valley II permits risk enhancement only in exceptional or rare cases. Because of the importance of this question of federal law and the likelihood of frequent repetition of this error, this Court should grant certiorari to resolve the conflict and settle the law. In doing so, this Court would also surely settle a related aspect of risk enhancement law which is still in a state of considerable confusion.

D. There Is Confusion And Conflict Among The Circuits As To Whether The Individual Case's Likelihood Of Success, The Factor Upon Which The District Court Denied Petitioners' Contingency Enhancement, Remains A Relevant Consideration After Delaware Valley II.

The six circuits that have adopted Justice O'Connor's standard, see Section I(C), supra, appear unanimous that the plaintiff's likelihood of success on the merits of the particular case was rejected as a relevant factor in Delaware Valley II. See, e.g., Spell v. McDaniel, supra at 1405; Thompson v. Kennickell, supra at 621; Jenkins v. Missouri, supra at 268. However, there are three circuits which take a different tack, creating a 6-3 split within the circuits on this point.

The First, Second and Sixth Circuits have not adopted Justice O'Connor's standard and have continued to base post-Delaware Valley II contingency enhancement decisions in part on their evaluation of the particular risks posed by the case. Jacobs v. Mancuso, 825 F.2d 559, 561 (1st Cir. 1987)(denying

enhancement on ground that "liability here was so plain . . . that, as a practical matter, the risk of not recovering a fee was all but eliminated"); Friends of the Earth v. Eastman Kodak Co., 834 F.2d 295, 298 (2d Cir. 1987)(denying enhancement because "the risks to plaintiffs' counsel appear slight", expressly noting there was no trial); Conklin v. Lovely, 834 F.2d 543, 553 (6th Cir. 1987)(quoting approvingly from Northcross v. Bd. of Ed. of Memphis City Schools, 611 F.2d 624, 638 (6th Cir. 1979, cert. denied, 447 U.S. 911 (1980), a test emphasizing the likelihood of success in the particular case).

This Petition assumes the correctness of the Eighth Circuit ruling that the legal risks peculiar to the particular case are irrelevant to determination of entitlement to a contingency enhancement,

and will focus principally on the need for this Court to settle the important question as to the plaintiffs' evidentiary burden to establish entitlement to the enhancement. Nonetheless, further evidence of the urgency for a Supreme Court decision settling this important area of civil rights law is the conflict which exists within the circuits as to the relevance of the legal risks peculiar to the particular case.

E. The Court Should Grant Certiorari Because The Evidentiary Standard Which Plaintiffs Must Meet In Order To Establish Entitlement To A Contingency Enhancement Is An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Petitioners submit that the Eighth Circuit badly misconceived the plaintiffs' evidentiary burden under Delaware Valley

II, an error which will undoubtedly be repeated and compounded in many circuits if not corrected by this Court. The Eighth Circuit's cursory decision is not aberrational, but rather manifests the confusion within the lower federal courts as to the application of Justice O'Connor's standard. The uncertainty spawned by Delaware Valley II was evident immediately to those litigants and courts familiar with fees law, a fact pointedly made in one of the first post-Delaware Valley II decisions.

The Third Circuit in Blum v. Witco Chemical Corp., 829 F.2d 367 (3d Cir. 1987), was openly critical of the ambiguities of Justice O'Connor's standard. It observed at the outset that the calculation of any contingency multiplier had been made "a daunting task indeed" as a result of Delaware Valley II:

> The 4-1-4 division makes it difficult to identify the reasoning or derive guidance from the various alliances the court formed to reach its holdings. In addition, the opinions themselves, insofar as they add up to five votes on the critical points, do not present clear mandates. Most difficult of all, the district court must tackle the task of translating the court's message into a blueprint for an evidentiary hearing, and make findings that will satisfy the DVCCCA II rule. Although we could pretermit this discussion and merely remand the counsel fee question to the district court for further consideration in light of DVCCCA II, awaiting development of a full record in this or some other case on appeal before coming to grips with some of the difficult problems that DVCCCA II poses, bearing in mind that counsel fee litigation is daily fare these days, our concern for the problems that will be faced day in and day out by the district judges within the circuit in the wake of DVCCCA II compels us to say something on the issue now.

Id. at 380.

The Third Circuit proceeded to comment on some of the gray areas left by Delaware

Valley II. The Court speculated as to whether it would be necessary for plaintiffs to utilize an expert economist to develop an econometric model, at a cost of "tens of thousands of dollars". Id. at 381. It also pointed out:

> "[S]uch a study would address only one side of Justice O'Connor's inquiry, for it says nothing about the question whether the multiple is necessary to attract competent counsel. ___ U.S. at ___, 107 S.Ct. at 3089-3090. How that question is to be answered--short of estimating the supply curve for plaintiff's legal services in these cases--is equally unclear. An econometric answer here would also be extremely expensive. The district court may wish to consider whether such studies are feasible and whether there are alternatives that will meet the DVCCCA II test."

Id. at 381.

No district court decision awarding a contingency enhancement based on Delaware Valley II standards has yet been reviewed

by a court of appeals. However, there are at least four prominent district court decisions which have awarded substantial contingency enhancements on essentially the same evidentiary showing rejected by the Eighth Circuit in the instant case.

All four cases were Title VII employment discrimination cases; three were class actions. Each expressly followed Justice O'Connor's standard. Hidle v. Geneva County Bd. of Educ., 681 F.Supp. 752 (M.D.Ala. 1988)(contingency enhancement of 100%, nearly $85,000); Palmer v. Shultz, 679 F.Supp. 68 (D.D.C. 1988)(contingency enhancement of 50%, $71,806); McKenzie v. Kennickell, D.D.C. No. 73-0974 (4-18-1988)(contingency enhancement of 50%, $345,000); Black Grievance Committee v. Philadelphia Electric Co., E.D.Pa. No. 75-3156

(6-20-1988)(contingency enhancement of 200%, $200,000). These courts based enhancement on the following evidence:

1. attorneys who take cases on a contingent fee basis expect to earn a higher hourly fee upon success than when paid regularly on a non-contingent fee basis;

2. the hourly return on successful contingent fees cases is generally at least double or triple that earned on a non-contingent hourly basis and often approaches $500 per hour;

3. it has become increasingly difficult for plaintiffs in civil rights cases to obtain counsel on a contingent fee basis because the economic risks assumed have not been adequately compensated:

a. many attorneys have cut back substantially on the civil rights portion of their practice; and

b. bar referral services are experiencing considerable difficulty in securing counsel for civil rights complainants.

The court in Palmer v. Shultz, supra at 75, summarized:

> It is clear therefore that the unavailability of contingency enhancements, combined with the demanding and protracted nature of Title VII class action litigation, would make it economically unfeasible for a great majority of attorneys to undertake such cases on a purely contingent basis.

Petitioners acknowledge that this conflict between these four district court opinions and the Eighth Circuit's ruling does not in itself present an independent basis for certiorari review, but it does confirm the Third Circuit's prediction in Blum that lower court confusion and disagreement would be considerable until this Court provides further guidance.

Confusion and disagreement breed litigation, a particularly unsatisfactory result in an area of the law that this Court has counseled should not become "second major litigation."

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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